

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE) Docket No. 13 C 9116
ATHLETIC ASSOCIATION STUDENT-)
ATHLETE CONCUSSION INJURY)
LITIGATION) Chicago, Illinois
February 25, 2019
11:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - FAIRNESS HEARING
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

For the Settlement Class: HAGENS BERMAN SOBOL SHAPIRO, LLP
BY: MR. STEVE W. BERMAN
1301 2nd Avenue, Suite 2000
Seattle, Washington 98101

HAGENS BERMAN SOBOL SHAPIRO, LLP
BY: MS. ELIZABETH A. FAGAN
1144 West Lake Street, Suite 400
Oak Park, Illinois 60301

SIPRUT, PC
BY: MR. JOSEPH SIPRUT
MR. TODD L. McLAWHORN
17 North State Street, Suite 1600
Chicago, Illinois 60602

For the NCAA: LATHAM & WATKINS, LLP
BY: MR. MARK S. MESTER
MS. JOHANNA M. SPELLMAN
MR. MARC KLEIN
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611

For the Objectors: RIFKIN WEINER LIVINGSTON, LLC
BY: MR. ARON RASKAS
7979 Old Georgetown Road
Suite 400
Bethesda, Maryland 20814

EDELSON, P.C.
BY: MR. JAY EDELSON
350 North LaSalle Street
14th Floor
Chicago, Illinois 60654

1 APPEARANCES (Cont'd):

2 For the Objectors
(Cont'd):

GORDON LAW OFFICES, LTD.
BY: MR. RICHARD R. GORDON
111 West Washington Street
Suite 1240
Chicago, Illinois 60602

5 COATS, ROSE, YALE, RYMAN & LEE
6 BY: MR. DWIGHT E. JEFFERSON
9 Greenway Plaza, Suite 1000
Houston, Texas 77046

7 Also Present:

JAMES C. SELMER & ASSOCIATES, PA
MR. MARC M. BERG,
via teleconference
500 Washington Avenue South
Suite 2010
Minneapolis, Minnesota 55415

11 Court Reporter:

MR. JOSEPH RICKHOFF
Official Court Reporter
219 S. Dearborn St., Suite 1232
Chicago, Illinois 60604
(312) 435-5562

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1 THE CLERK: Case 13 CV 9116, NCAA Student-Athlete
2 Concussion Injury Litigation.

3 THE COURT: All right. Good morning, everyone.

4 MR. JEFFERSON: Good morning, your Honor.

5 THE COURT: We had a bit of a delayed start today
6 because of the Level 2 HAZMAT incident in the courthouse,
7 which now has been cleared up. So, we're just going to
8 proceed with the agenda that I issued on February 20th, 2019.

9 First, I'll address arguments with regard to the
10 motion for final approval of the second amended class
11 settlement; then I'll hear arguments with regard to settlement
12 counsel's petition for fees, expenses and incentive awards for
13 settlement class representatives; and, finally, I'll address
14 -- or hear arguments -- with regard to the remaining petitions
15 for attorneys' fees and service awards.

16 So, basically, how I'd like to proceed is, if you are
17 addressing the Court, if you could just stand up and just tell
18 me your name and the party that you're representing as the
19 proceedings continue.

20 So, I guess first up is the settlement class
21 counsel's arguments with regard to the motion for final
22 approval.

23 MR. BERMAN: Good morning, your Honor, Steve Berman
24 on behalf of the class -- settlement class.

25 Because there are people watching, I prepared a

1 PowerPoint so people can follow along my comments. I have a
2 hard copy. I don't know if you want a hard copy, your Honor.

3 THE COURT: I can see it from here. Thank you.

4 MR. BERMAN: That's good, because there's a typo in
5 the hard copy.

6 Your Honor, we're pleased to be before you moving for
7 final approval. And I'd like to place this in context,
8 because this is not a typical final approval hearing in some
9 senses. You had the foresight to say, this is one of the
10 cases in which I'm going to do a piercing analysis at the
11 preliminary approval stage, and you did so. So, I think we're
12 at a much more advanced stage than normal. The Court is more
13 informed than normal. We worked through many things at great
14 length. So, I'm going to be, actually, fairly brief today,
15 unless the Court has questions.

16 So, I don't think there's any dispute that these are
17 the five standards that the Seventh Circuit looks to in
18 evaluating settlement. And I'm just going to march through
19 those in order.

20 The first factor is the strength of the plaintiffs'
21 case versus what we actually achieved in the settlement. And
22 this is a very unusual case because, as I mentioned to the
23 Court before, I think we obtained more in the settlement than
24 we could if we just continued with the litigation; and, I'll
25 go through the reasons why that's the case.

1 Basically, the settlement achieves everything we
2 would have asked for in terms of medical monitoring, plus
3 more; and, it achieves everything we would have asked for in
4 the return-to-play protocols that we've set up.

5 So, first, in terms of the breadth, the settlement
6 does something that we couldn't have done if we continued to
7 litigate; in that, it covers all genders, all sports, all
8 ages, all states, all time periods, which we could not have
9 accomplished if we continued to litigate.

10 And as the Court is well aware, that medical
11 monitoring includes the medical monitoring fund, which goes
12 for 50 years. It includes medical evaluations. And when I
13 mention that we achieved everything we could achieve, at one
14 point Mr. Edelson argued before the Court that, actually, you
15 can get more than the cost of medical monitoring if we
16 litigated. And the Court did its own research and disagreed
17 with Mr. Edelson.

18 So, we actually achieved in medical monitoring what
19 we could have gotten, and more, if we went to court -- went to
20 trial.

21 The other thing that augers in favor of final
22 approval is some of the opinions, I think, of the experts.

23 Now, Dr. Cantu is without question one of the leading
24 concussion doctors in the country. He's the go-to guy. And
25 he has opined that the medical monitoring is valuable because

1 student athletes may be experiencing conditions and symptoms
2 they don't really understand. They're going to go in, they're
3 going to get a test, and that test can say, you're suffering
4 this from a concussion you had; here's what we can do to help
5 your life. We can give you more tests, or we can design a
6 therapy program to help offset the effects of this concussion
7 that you have.

8 So, it's a very valuable tool to help these student
9 athletes. And we designed the tool to go for 50 years.

10 Every single student athlete who's a member of the
11 class can avail themselves of the medical monitoring. They
12 can complete the questionnaire five times, and they can
13 qualify to receive a medical exam twice. And there's a
14 special clause that we instituted at your request: For good
15 cause, people can petition the Science Committee if they want
16 to have an additional examination.

17 The other benefit that class members will receive
18 that, I think, augers in favor of the settlement is that we
19 have the world's best experts on this Medical Science
20 Committee. You know, we picked two of the best in the
21 country. The NCAA picked top doctors. I have not always
22 agreed with what they say, but they clearly are day-to-day
23 dealing with concussions and the growing science that's going
24 to surround concussion treatment as we go forward through this
25 program.

1 So, the Court should be assured that there are some
2 really smart people that are going to be working on this
3 problem for the next 50 years.

4 So, if I look at -- again, looking at what we could
5 have gotten if we kept going and what we did get -- because
6 that's one of the first factors -- the settlement is for all
7 states. And we know -- and your Honor's already mentioned in
8 one of your prior orders -- that medical monitoring relief is
9 not available in all states. So, again, if we had gone to
10 trial, we would not have gotten the sweeping, all-state
11 coverage that we did.

12 Also, as I mentioned earlier -- and we've had this
13 discussion before -- there's an unlimited time period in the
14 settlement. So, everyone that was ever an NCAA athlete gets
15 the benefit of medical monitoring. If we had gone to trial,
16 we would have had a vigorous debate about when there was a
17 consensus of best practices for treating concussions. It may
18 have been 2002. In our complaint we said it was 2004. Maybe
19 the NCAA would have got a jury or your Honor to say it was
20 2007 or 2010. But in this settlement, we took away that time-
21 period issue, which is a benefit to the class.

22 And we achieved in the medical monitoring everything
23 that Dr. Cantu set forth in the complaint and the class
24 motion. So, we got a hundred percent, which is very unusual
25 in presenting a settlement to the Court. Usually you come

1 in -- class counsel -- and say, damages were X, we got 10
2 percent, 20 percent, 30 percent. But that's not what we're
3 seeing here today.

4 Then with respect to return to play, I'm not going to
5 go through each one of these, because I think your Honor's
6 written about them and is familiar with them. But we set out
7 to change the way the NCAA treats concussions, and we achieved
8 everything that we think is part of the best practices for
9 concussion management. And, again, that is going to be very
10 valuable to the class.

11 So, that gets us up to what the class is giving up.
12 And I don't think I need to repeat this, because this has been
13 the focal point of a lot of argument and opinions by your
14 Court -- by the Court. But we're preserving -- and your Honor
15 now has all these cases in front of him -- the right to bring
16 personal injury claims and the statute of limitations is
17 tolled. So, I do not believe that the class is really losing
18 much, and I think that the Court has already ruled the same.

19 They're waiving a right to bring a nationwide (b) (3)
20 class. And the Court found that that was of minimal value at
21 best. So, it's not something that they're giving up so much
22 that the rest of the benefits don't weigh in favor of a
23 settlement.

24 On the 23(c) (4), the issue class, we actually brought
25 this as a (c) (4). We wanted a (c) (4) issue class for the

1 Court to decide duty. This was one of the goals of
2 litigation. The Court ruled, in connection with Mr. Edelson's
3 motion, that there was no 23(c)(4) certification strategy
4 presently before the Court, that the Court agreed with.

5 So, the fact that we were able, again, to get this
6 nationwide class and return-to-play protocols in place exceeds
7 where we would have gotten in all likelihood.

8 The second factor, the complexity of the case.
9 You've already written on that, so I'm not going to dwell on
10 that. Obviously, if we kept going, this was going to be a
11 lengthy and drawn-out affair. So, that augers in favor.

12 The third factor, lack of opposition. There were
13 3.958 million notices sent to people. We had 21 objections,
14 for an extraordinarily low objection rate. So, that, again,
15 augers in favor of the class.

16 And this is a class that had more notice than most.
17 It had mailed notice. It had media notice. These are all
18 college graduates. It's a matter that's important to many of
19 them. So, the lack of objection, I think, favors approval.

20 The next factor, your Honor, is the opinion of
21 counsel. Well, you have more than the opinion of counsel.
22 You have the opinion of the medical experts, which had filed
23 affidavits in favor of the settlement.

24 And to the extent that your Honor listens to the
25 opinion of counsel, with respect to the return-to-play aspect

1 of the settlement, we believe it is an important settlement.
2 I have handled six to eight NCAA-related concussion cases.
3 So, I've dealt with these student athletes, all of whom, in my
4 view, were hurt because they were returned to play too early.
5 And it is a sad thing to have to deal with a student athlete
6 who is 21, 22 years old, drops out of school, and then they
7 seem to go on this path of depression, isolation, drug use,
8 and their lives really unravel.

9 So, if the return-to-practice protocols can stop that
10 from happening, that's a thing that we all should be proud of,
11 the Court and all the lawyers.

12 The last factor is that based on a full record, the
13 Court is, I think, well aware that there was an extensive
14 record on class certification and getting to class
15 certification and offering opinions in support of class
16 certification. In fact, Mr. Edelson said the record was
17 complete enough for him to bring his (b) (3) motion. He didn't
18 need any more discovery. So, that also augers in favor of the
19 settlement.

20 Obviously, we didn't leave any stone unturned. We
21 knew the facts at the time that we settled.

22 And the last thing I'd like to say in support of the
23 settlement is -- I don't know if the Court read through all
24 the letters that came in. There were quite a few.

25 THE COURT: I did read through all of them.

1 MR. BERMAN: But this one really struck me. And this
2 is from this University of Arizona student athlete, where she
3 talks about how grateful she is for the settlement and the
4 work that was done here and the work that may help her in the
5 future. We don't always get those kind of comments when we're
6 presenting a settlement to the Court.

7 So, unless the Court has any questions, we strongly
8 submit that the five factors all weigh in favor of approval of
9 the settlement.

10 THE COURT: Thank you, Mr. Berman.

11 MR. BERMAN: Thank you.

12 THE COURT: I do not have any questions at this time.
13 I'm fully aware of the record and have reviewed all the
14 materials that everyone has submitted with regard to the
15 fairness hearing and the proposed class settlement.

16 So, at this point, then, I will recognize counsel for
17 Ms. Samantha Griebner, as well as Ms. Donlon and Ms.
18 Spinazzola.

19 MR. RASKAS: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. RASKAS: Thank you very much.

22 Your Honor, if I may hand up -- I had previously
23 transmitted some exhibits, but this is another copy.

24 THE COURT: Can you please state your name.

25 MR. RASKAS: Yes, your Honor. Aron Raskas. I

1 represent Samantha Griebner, Lacey Donlon and Marisa
2 Spinazzola, three women who play NCAA -- or have played
3 NCAA -- lacrosse.

4 Your Honor, with me in the courtroom today is
5 Ms. Griebner. She's one of the student athletes that
6 Mr. Berman described who suffered terrible effects from
7 concussions.

8 Your Honor, Mr. Berman talked about the piercing
9 analysis that the Court conducted. And I understand that.
10 I've read it. And I appreciate everything that your Honor has
11 done, the conscientious manner in which the Court has
12 approached this and, certainly, the conscientious manner in
13 which counsel have approached this, as well. And I wish I
14 could have been part of that debate back in 2015, early 2016,
15 about classes and the like. But, unfortunately, we weren't
16 aware of it. And I guess that's the purpose of notice and
17 objection. That's why we're here.

18 And the reason we're here, your Honor, is because
19 across the continuum of NCAA sports, there's one sport and one
20 group, and one sport and one group only, where the NCAA
21 maintains rules to protect male lacrosse -- male players from
22 concussions and serious head injuries in the sport, yet
23 simultaneously continues to promulgate rules that discriminate
24 against the women playing that sport by making it illegal for
25 them to protect themselves the same way that the men protect

1 themselves.

2 And that sport obviously is lacrosse, and that group
3 is women's lacrosse players.

4 And their unique, serious and substantial claims were
5 simply not addressed in this litigation.

6 I know that your Honor has read our papers, so I'm
7 not going to re-plow that ground. But I do want to amplify
8 some developments since then and respond to any questions that
9 the Court may have.

10 Your Honor, our argument is several-fold. The
11 proposed settlement, we believe, is not fair, reasonable or
12 adequate, as it does nothing to address the unique
13 vulnerabilities of this putative subclass of women, the women
14 lacrosse players.

15 Right now, in this litigation, women lacrosse players
16 have the right to proceed in this action as a nationwide class
17 with a very strong case to obtain an order against the NCAA
18 that would require the NCAA to allow them to protect
19 themselves by wearing helmets, just like men do. But this
20 settlement, if approved, would wrongfully strip from them that
21 right and ability to seek the protection that they need as a
22 nationwide class. And that's a valuable procedural right that
23 your Honor previously recognized. And I'll come back to that
24 in a few moments.

25 Furthermore, we believe that before you even get to

1 whether this settlement is fair, reasonable or adequate, under
2 the guidance of Amchem and Ortiz you have to determine whether
3 or not the class can be properly certified. And we believe
4 that the class cannot be certified under Rules 23(a)(3) and
5 (a)(4), typicality and adequacy of representation, because,
6 despite their conscientious efforts in this case, the class
7 counsel and the named class representatives did not adequately
8 protect the interests of this putative subclass of women
9 lacrosse players.

10 Your Honor, we filed our objection back in August of
11 2017, and since then there's been developments in the case
12 that your Honor's aware of that we've been prosecuting in New
13 York on behalf of Ms. Griebner. And there's a confidentiality
14 order, protective order in that case, which the NCAA has
15 fought strongly to defend. So, what I can say about that case
16 and the documents in that case is limited.

17 But I am authorized to say that there are documents
18 and depositions in that case brought by Ms. Griebner in New
19 York against the NCAA that are very relevant to this class
20 action. The NCAA produced 80,000 pages of documents. I've
21 identified over 125 as very relevant exhibits. Those
22 materials could have been obtained in this litigation had the
23 interests of women lacrosse players been adequately
24 represented. Counsel could have considered those before
25 making determinations. Counsel could have used them in

1 negotiations with the NCAA in settlement. And that's what's
2 available in this case.

3 In addition, your Honor -- and I've given to counsel
4 here, and I've submitted to the Court, five documents that I'd
5 ask the Court to enter into the record as exhibits on behalf
6 of these three objectors in this case. Four I previously
7 transmitted to the Court and to counsel. There's a fifth here
8 that I've just included here.

9 And let me just review them very briefly, because
10 I'll come back to them and explain why they're relevant.

11 The first is an order entered by the court in New
12 York. And that's Exhibit 1. And on Page 8 of that opinion,
13 that judge, Judge Brown, in the Supreme Court for Nassau
14 County, concluded, in denying NCAA's motion to dismiss, that
15 the NCAA's argument that it cannot be liable because the
16 plaintiff assumed the risks inherent in the sport of lacrosse
17 is unavailing because, he held, through its control over the
18 rules of play and equipment, NCAA effectively prohibited the
19 plaintiff from utilizing protective headgear. As the party
20 with authority to make rules concerning the safety equipment
21 utilized by athletes on the field of play and who undertook to
22 exercise that authority, NCAA had a duty to avoid exposing the
23 plaintiff to risks that were unreasonably increased.

24 That's directly relevant to the issues here, your
25 Honor.

1 THE COURT: Could I ask you a question.

2 MR. RASKAS: Yes, your Honor.

3 THE COURT: What is the relief that you are seeking
4 before the New York Supreme Court?

5 MR. RASKAS: We are seeking damages. We have not
6 sought injunctive relief in that case, your Honor. It's a
7 state court action.

8 We believe that the place to seek the injunctive
9 relief that's necessary to protect women across the country
10 who play NCAA lacrosse is first and foremost in this action.
11 And that's why the release that would release their right to
12 proceed in this action on a class-wide basis is of such
13 significance to them.

14 We believe that --

15 THE COURT: But there wasn't anything procedurally
16 that would have prohibited you from seeking that injunctive
17 relief -- at least nothing out of this Court that would have
18 prohibited from you doing that -- in the New York court; isn't
19 that correct?

20 MR. RASKAS: That's correct, your Honor. Yes, it is.

21 THE COURT: And, presumably, if -- and I know that
22 the NCAA and other people have raised concerns about standing
23 because Ms. Griebner is no longer a lacrosse player, and
24 various other issues.

25 But focusing on the release that is the basis for the

1 objection that you raise, if a current lacrosse player -- say,
2 to deal with the standing objections -- would file an
3 individual suit, whether it's New York or Illinois or where
4 have you, asking for injunctive relief to require the NCAA to
5 require helmets for women lacrosse players and the court
6 orders such injunctive relief, as a practical matter wouldn't
7 that mean that all women lacrosse players would benefit from
8 that order requiring the NCAA to mandate helmets for women
9 lacrosse players?

10 MR. RASKAS: That's not clear, your Honor. And
11 that's the hub of the issue.

12 The NCAA says, in its response to our objection on
13 Page 5, that if we did that, if we were successful in
14 obtaining such specified relief for a single school, the
15 result would likely be a rule change. There's no commitment
16 to that. It's far from certain.

17 The NCAA could theoretically -- your Honor said
18 practically speaking. The NCAA, practically speaking, could
19 decide not to sponsor lacrosse at that particular member
20 institution after that case and cut it out. We'd have to
21 start all over with another school, go school by school by
22 school.

23 So, the NCAA could agree here today to be bound by it
24 if that would be the case, but they haven't said that here.
25 They said it would likely. And, you know, if there was a

1 commitment that -- as your Honor just said, if we got an
2 injunction on a single-school lawsuit ordering that relief,
3 that the NCAA would agree that it's binding upon them to make
4 the rule change nationally, that would be a development to
5 this case and that would expand the release here -- or limited
6 release.

7 THE COURT: Has there ever been a prior instance
8 where the NCAA has taken such action; that is, in response to
9 complaints from student athletes at a particular school,
10 basically disenfranchised that school or disaffiliated that
11 school from the NCAA as a result of those complaints?

12 MR. RASKAS: I can't stand here and represent to your
13 Honor that I'm aware of that, but I don't see why it's not a
14 possibility. Certainly, it seems to me a very realistic
15 possibility.

16 And, again, the NCAA has the power to commit here. I
17 mean, they're parties to this with Mr. Berman. And they could
18 commit that the release does not have the effect -- does not
19 limit us from obtaining an injunctive relief that would apply
20 nationwide to the NCAA women lacrosse rules. You know, if
21 that modification was put on the record, that would be a
22 substantial step forward toward what we would consider the
23 fairness and reasonableness and adequacy of the settlement.

24 THE COURT: So, I mean, putting aside the issue
25 that's percolating up to the Supreme Court about the authority

1 of one district court to enter nationwide injunctions, if
2 Ms. Griebner -- if she were to file it in the Southern District
3 of New York, say, or in the Southern District of Indiana, or
4 here; and filed a suit on her own behalf or on behalf of
5 lacrosse players, her teammates who played during the four
6 years at her particular school; and, as part of that lawsuit,
7 she asked this Court to issue an injunction requiring the NCAA
8 to promulgate rules requiring female -- women lacrosse players
9 to wear helmets, one would think that, at least under the
10 current state of the law, that the NCAA, if I were to issue
11 such an order, would abide by that order.

12 And there's nothing in the settlement that would
13 prevent Ms. Griebner, or really anyone else, from filing such a
14 suit, so long as it is limited to a single school or -- and a
15 particularly definable class that satisfies Rule 23; isn't
16 that correct?

17 MR. RASKAS: That's sort of putting the -- a
18 secondary issue before the primary issue. That being the fact
19 that this action was brought on behalf of all women lacrosse
20 players who are part of the class.

21 And, you know, if you look at the claims for
22 relief -- at the complaint -- I mean, every single cause of
23 action focuses as one of its targets the failure to promulgate
24 rules and regulations to adequately address the dangers of
25 repeated concussions, failure to implement and enforce game

1 rules of play. The request for relief specifically seeks, in
2 Paragraph 104 --

3 THE COURT: Oh, no. Believe me, I'm intimately aware
4 of all the filings in this case.

5 MR. RASKAS: So, this is the place where it should
6 have been done.

7 THE COURT: But why? I mean, why is this the place
8 that should have been done?

9 Why, for example, if a women's lacrosse player --
10 let's say a current women's lacrosse player -- playing at
11 USC -- let's just throw out a name out there. I don't know if
12 USC has a women's lacrosse team, but presumably they do. It's
13 a big school.

14 And say that she wants to bring a class action for
15 those women that are playing lacrosse at USC in the academic
16 year 2018-2019. And she's going to graduate in 2021. Okay?

17 So, as part of that, she files not only a suit for
18 damages, but a suit for injunctive relief -- which according
19 to the NCAA and plaintiffs' counsel, they're both on record
20 before this Court saying that that is absolutely permissible
21 notwithstanding the release in this case -- and she
22 adjudicates that claim, and whether or not she obtains class
23 certification, and gets a -- she's certainly able to litigate
24 that claim. And if she proves her claims, then the court in
25 that case has the authority to award injunctive relief and

1 require the NCAA to mandate that particular rule change across
2 the NCAA.

3 So, I guess my question is: I understand what this
4 case started out with, but really the focus of the fairness
5 hearing is trying to figure out what are the putative class
6 members getting -- what are they getting -- in exchange, or
7 what are they giving up?

8 And as I've written before, the right to bring a
9 nationwide class with all of the various burdens that might
10 impose, I wonder -- and I would like you to address -- how you
11 would value that right versus the consideration that the
12 settlement would provide them.

13 MR. RASKAS: Several things, your Honor, and that
14 goes back to the original point. In that USC action, in that
15 case where we would prevail and get an injunction, I don't
16 know that the court could order -- because it's a
17 single-school, single-sport case -- that the court could order
18 it to be binding upon the NCAA nationwide. I think the NCAA
19 would have the ability, under the release in this case, to
20 argue that it was released from an injunction that would apply
21 nationwide because this was only a single-school action.

22 Again -- again -- you know, the NCAA won't come up to
23 the line, past the line and say that. They say it would
24 likely be a rule change. Again, if it would be on the record
25 here today that -- as your Honor said, that that's the case,

1 that would change the dynamic of the settlement and is
2 something that we believe would be much better for the women
3 lacrosse players and their ability to pursue that.

4 With respect to your Honor's opinion in January of
5 2016, your Honor denoted it was a valuable right but found
6 that under a 23(b)(3) class, the class could never be
7 certified; so, therefore, when you did the balancing and what
8 value you were giving up, there was no reason to value it
9 significantly.

10 But here, this would be a class that's uniquely
11 situated for a 23(b)(2) action. You could easily certify a
12 class of women lacrosse players who are pursuing injunctive
13 relief for a rule change.

14 THE COURT: And do any of your clients -- are any of
15 your clients currently women lacrosse players?

16 MR. RASKAS: Yes, your Honor. Marisa Spinazzola is a
17 women lacrosse player who started her season now at Mercy
18 College in New York. And she seeks that right. And if this
19 settlement is approved, she'd be giving up that right to
20 pursue it on behalf of the class on a class-wide basis.

21 But, your Honor --

22 THE COURT: But -- again, I just want to be clear.
23 But she can bring that suit on her own basis or on behalf of a
24 class of women lacrosse players from her school, assuming she
25 can define an adequate class?

1 MR. RASKAS: Yes, your Honor. But the concern that I
2 keep coming back to is what impact that has and what the
3 release will ultimately give the --

4 THE COURT: Well, with regard to Ms. Spinazzola, even
5 under your scenario, she would obtain the relief, right?

6 I mean, if she were to bring her own individual case
7 and the court would require the NCAA to make a rule change,
8 even under the scenario where the NCAA would make a rule only
9 for one school versus the other schools, I can't imagine the
10 other people in the conference would like that, such a rule.
11 But let's say the NCAA did. Ms. Spinazzola would get that
12 relief, right.

13 MR. RASKAS: She would, and then the question becomes
14 what impact it has on the NCAA nationwide or not. And, again,
15 you know, that is something that the NCAA won't commit to.
16 And if we're on the record here today that it has that impact,
17 that would be a significant difference.

18 Your Honor, we have the benefit now of the 2018
19 amendments to Rule 23. And, you know, in looking at that, the
20 factors there -- Mr. Berman reviewed the Synfuel factors in
21 the Seventh Circuit. But looking at some of the additions in
22 the 23(e) amendments, the Court must consider the class
23 representative and cast how -- whether the class
24 representatives and class counsel have adequately represented
25 the interest of the class and whether the proposal -- this is

1 23(e) (2) (D) -- whether the proposal treats class members
2 equitably relative to each other.

3 Your Honor, this is the only group that's denied the
4 right to protect themselves like their male counterparts, and
5 now they're being asked to waive that right; to proceed in
6 this action on a class-wide basis to preserve that right. And
7 under that, we would argue that this certainly does not treat
8 them equitably to all others.

9 Additionally, there's an important Committee note
10 that was just recently offered in connection with the
11 amendments. The Committee Notes to Paragraphs (A) and (B)
12 talk about some factors that the Court has to focus on. And
13 it says, for example, the Court has to focus on the nature and
14 amount of discovery in this or other cases or the actual
15 outcomes of other cases, because they may indicate whether
16 counsel negotiating on behalf of the class had an adequate
17 information base. The pendency of litigation about the same
18 general subject on behalf of class members may also be
19 pertinent.

20 And, your Honor, again, I'm not here to attribute
21 malfeasance to anyone. This is just something that was
22 missed, plain and simply. But that's not excusable. There
23 was no focus upon this critical, critical issue. It's the
24 only time -- it's the only group of people who are denied the
25 same rights as the male players.

1 And if you turn to the adequacy of the 23(a) (4)
2 factors, the court in Amchem and Ortiz is very clear that you
3 can't jump over the fairness of -- the fairness of a
4 settlement isn't sufficient reason to disregard the 23(a)
5 analysis and first you have to find adequacy of
6 representation.

7 And when you come to that, your Honor, it becomes a
8 burden-of-proof issue here, that the party seeking
9 certification has the burden of demonstrating that
10 certification's proper by a preponderance of the evidence.
11 Your Honor found that in the McDaniel case. The Seventh
12 Circuit has held that. The Seventh Circuit has very clearly
13 said, I quote, that the named plaintiffs must adequately
14 protect, quote, the different, separate and distinct interests
15 of the absentee members.

16 And in a recent case that came out of this Court in
17 2018, Ocampo vs. GC Services Limited Partnership, 2018 WL
18 6198464 at Page 9, the Court found that the class
19 representative has to be sufficiently interested in the
20 outcome to ensure vigorous advocacy.

21 And, your Honor, we've now demonstrated that this
22 issue was simply not explored. I would like to come back for
23 a moment to these few papers here; specifically, the expert
24 report that Dr. Cantu provided in the New York litigation.

25 And I don't have to tell your Honor who Dr. Cantu is.

1 Mr. Berman referred to him. And he outlines here in Paragraph
2 7 through 11 a couple of very important points.

3 He talks about NOCSAE -- the National Organization
4 For Certification of Safety and Athletic Equipment; it sets
5 the standards -- had been asked to set a standard -- had been
6 asked by U.S. Lacrosse to set a standard for women's lacrosse
7 helmet. And it advised U.S. Lacrosse that any helmet for
8 women lacrosse players should be equivalent in protection to
9 helmets worn by men lacrosse players. And they're capable of
10 providing that.

11 If you look at Exhibit 5, that recommendation that
12 was sent to U.S. Lacrosse made its way to the NCAA, as well.
13 The NCAA was aware of that.

14 And Dr. Cantu concludes that it's his opinion to a
15 reasonable degree of scientific certainty that the NCAA
16 rendered Samantha Griebner uniquely vulnerable to concussions
17 by making it illegal for her to wear a helmet. And he
18 explained that helmets are uniquely constructed to prevent the
19 types of concussions that come from strikes by a ball and
20 strikes by a stick. There's other forces that cause
21 concussions, but helmets are constructed to prevent those.
22 And that's in Paragraph 7.

23 And he concludes, in Paragraphs 10 and 11, with two
24 opinions that are critical. It's his opinion to a reasonable
25 degree of scientific certainty that girls and women playing

1 lacrosse should be required to wear hard helmets, similar to
2 men, in game competition and practice. And it's his opinion
3 to a reasonable degree of scientific certainty that the
4 implementation of a rule for women's lacrosse mandating the
5 use of a hard helmet by all women lacrosse players would
6 enhance the safety of those players and reduce the risk of
7 concussion and other serious head injuries.

8 And, then, just lastly, this next thing is -- Exhibit
9 3 -- is an expert report from Dawn Comstock, who is one of the
10 foremost sports epidemiologists. She maintains a database of
11 all high school injuries.

12 And she concludes in Paragraph 37 -- remember
13 Dr. Cantu says that helmets are uniquely constructed to
14 prevent concussions caused by stick or ball strikes. And in
15 Paragraph 37, she concludes that -- drawing on high school
16 data, which she says she could extrapolate to college, as
17 well -- that overall 71.52 percent of girls' lacrosse
18 concussions were the result of being struck by the ball or
19 stick. And, therefore, she can estimate that 42 percent -- 42
20 percent -- of girls' lacrosse concussions could be prevented
21 if players were allowed to wear the helmet required of boys'
22 lacrosse.

23 And that's a stunning statistic, your Honor. And
24 yet, the NCAA has done nothing. And more important, your
25 Honor, coming back to the issue in this case, nothing was done

1 to explore that in this case.

2 And if you go back to those Committee Notes and to
3 Rule 23(a) -- 23(e), Paragraph (A) -- the available evidence,
4 the available -- the discovery that could have been conducted
5 is all factors that the Court has to look at in determining
6 the adequacy of representation.

7 THE COURT: So, the amendments to Rule 23 that I'm
8 familiar with, actually Judge Dow of this Court was the head
9 person on the rules -- Advisory Rules Committee that led the
10 revisions to Rule 23. But the Rule 23 amendments really were
11 an effort to codify what was already in the case law that the
12 Supreme Court and other Circuit Courts laid out.

13 So, I don't think that the new Rule 23 amendments
14 were meant to be a substantive change or a sea change in the
15 way that courts are to evaluate settlement -- proposed class
16 action settlements. They just wanted to recognize the various
17 case law that you've, Mr. Raskas, adequately cited, correctly
18 cited about the probing analysis the Court should do, not only
19 at the final approval stage, but also at the preliminary
20 approval stage. So, that gave me a little vindication.

21 But in any event, it seems to me, though, that the
22 very fact that you're pursuing this lawsuit in Nassau County,
23 New York, the very fact that you have the reports of Dr. Cantu
24 and Dr. Comstock, the very fact that you have engaged the NCAA
25 in discovery in your claims, doesn't that just show that there

1 are plenty of other available fora for women lacrosse players
2 to raise their concerns notwithstanding the limited release
3 that is being proposed in this case?

4 MR. RASKAS: Your Honor, with all due respect, that
5 doesn't -- I've done that on my own. But that doesn't excuse
6 what was not done here. And that doesn't vitiate a Rule
7 23(a)(4) analysis in this case about whether the class
8 representatives adequately represented this subclass.

9 Again, I wasn't around in 2015 when your Honor did
10 the analysis and added -- or it orally ordered, you know, new
11 named plaintiffs. There was no one from women's lacrosse who
12 was named as a class representative. There were two
13 subclasses made, obviously for contact and non-contact. Had
14 we been aware of this, we would have argued that a subclass
15 must have been created for women lacrosse players. And we
16 believe that follows from Amchem. We believe it's similar to
17 the McDaniel case, your Honor, that your Honor had. It's
18 similar to the Literary Works case out of the Second Circuit,
19 a couple other cases.

20 And the reason for that is, your Honor, because what
21 you have here is you have one class of -- one unique subclass
22 of -- student athletes who have this great need for protection
23 going off into the future. And others do, too, in some
24 respects, but they have this need to change the rule to
25 protect them in the future. And the others aren't going to

1 get any different protection; they're just going to get
2 return-to-play rules and changes like that. And everyone else
3 is focused on the here and now.

4 And I realize that Amchem and other cases are damages
5 cases and there's a finite pool of money and the conflicts
6 arise out of that. But there's certainly a conflict in
7 vigorousness of representation, focus on representation, and
8 the need to find a result that protects these people.

9 And, your Honor, I come back to the burden of proof.
10 There's a burden of proof on the plaintiffs' class to
11 demonstrate that they adequately represented them. And by
12 demonstrating that all of this evidence was available -- it is
13 available. It's sitting at the NCAA. Discovery requests
14 could have been served. Depositions could have been taken.
15 Nobody has stood up here and said, we served discovery
16 requests aimed at women's lacrosse. Nobody said, we took
17 depositions of the women's lacrosse rules committee. No one
18 said that, we took depositions about the data, the stunning
19 statistics of injury rates in women's lacrosse.

20 THE COURT: Right, but I guess my point is --

21 MR. RASKAS: And, lastly, nobody said that they've --

22 THE COURT: Hold on.

23 MR. RASKAS: -- explored --

24 THE COURT: Please --

25 MR. RASKAS: -- any settlement.

1 THE COURT: The number one rule is: Don't talk over
2 the Judge. Okay?

3 But isn't the point that -- the very fact,
4 Mr. Raskas, that you've done the discovery; and, nothing in
5 the settlement would preclude you from doing that discovery in
6 this case or any case in the future.

7 So, it's not like if the settlement is approved, that
8 the NCAA will then be able to bury whatever documents it has
9 or -- with regard to any sports. But even under the terms of
10 the settlement, women lacrosse players -- or, for that matter,
11 any other athlete -- can file their lawsuits, obtain that
12 discovery and bring those issues to light.

13 MR. RASKAS: That's true, your Honor.

14 And, first of all, my apologies. I should not have
15 done that. I apologize for talking over your Honor.

16 But that doesn't eliminate the 23(a)(4) analysis
17 about whether the class could be properly served by. There
18 should have been a subclass here. There needs to be a finding
19 that there was adequate protection of this subgroup. There
20 simply isn't, your Honor.

21 I see I'm approaching 29 minutes here, and I don't
22 want to belabor my time here.

23 THE COURT: You can go ahead and finish.

24 MR. RASKAS: I would just -- I appreciate that, your
25 Honor. Thank you. Thank you.

1 I just mean to say that there's been no demonstration
2 that this was explored in settlement either. And I believe
3 that class counsel has an obligation, if they could, to make
4 the case, to make a record that they did explore all these
5 issues to adequately protect the subclass.

6 I'll turn lastly to the Synfuel factors, the Seventh
7 Circuit factors. In terms of the strength of the plaintiffs'
8 case compared to the amount of defendant's settlement offer,
9 again, you know, we have -- and I realize, yes, I have a
10 strong case in New York. I'm happy about that. But that
11 doesn't take the focus or the analysis over what's going on
12 here.

13 And there was a strong case for these women lacrosse
14 players. The fact that a judge concluded that they could be
15 held liable for breach of duty is significant. The fact that
16 there's discovery. The fact that there's opinions from no
17 less than Dr. Cantu. He was on record before I got his
18 opinion in his book -- that's Exhibit 4 over here -- that
19 women lacrosse players should have helmets. All this was
20 information that was available to the class representatives
21 and counsel and wasn't explored.

22 In terms of the complexity, length and expense of the
23 litigation, it would be more than proportionate to the
24 substantial risks of severe and even permanent injury that
25 women lacrosse players face.

1 Evaluation of the amount of opposition. I
2 acknowledge that we have three objectors here on behalf of
3 women lacrosse players. But that's a result of the fact that
4 this was never on the radar screen, we would argue.

5 In terms of the opinion of competent counsel,
6 precisely because this issue was never apparently addressed,
7 there never was an opinion on it about whether waiving this
8 right for women lacrosse players or failing to pursue relief
9 for women lacrosse players was done or not.

10 And, you know, Mr. Berman referred to the opinions of
11 the Medical Science Committee. Well, you have Dr. Cantu
12 saying they need a rule to prevent these women from getting
13 concussions and you can just put the helmets on them like they
14 do for the men. So, that certainly weighs in factor of it.

15 And in terms of the stage of proceedings and amount
16 of discovery completed at the time of settlement, well, no
17 discovery. Again, I haven't heard that any discovery was
18 aimed or focused at all on this issue of women lacrosse
19 players.

20 So, your Honor, just to summarize -- and, again, I
21 thank you for the time. And, again, I apologize for
22 interrupting your Honor.

23 Just to summarize, before you even get to the fair,
24 reasonable and adequate, you have to conduct the 23(a)(4)
25 analysis. We don't believe that the named plaintiffs and

1 class counsel -- again, not through any malfeasance, just for
2 oversight, failed to adequately represent this subclass. We
3 believe a subclass should have and needs to be appointed, so
4 that women lacrosse players can pursue in this action on a
5 nationwide class basis their claims to seek the relief that
6 they need and to protect themselves.

7 If your Honor does get past that, then we believe the
8 settlement is not fair, reasonable and adequate, because
9 unless the NCAA -- and, again, the NCAA and class counsel
10 should acknowledge -- if your Honor is correct that the
11 release would not preclude us in a single school from
12 enjoining the NCAA nationwide, then the NCAA counsel will
13 stand up here and, you know, I hope they will say that and
14 acknowledge that.

15 And, lastly, your Honor, you know, I was accused of
16 being a professional objector. I'm probably the only guy in
17 this courtroom that's never been in a class action case. This
18 is my first time. It wasn't our purpose here.

19 But we believe that the settlement should be -- that
20 this relief should be given. And if that is the case, under
21 the provisions that your Honor did ask to be included in the
22 settlement, we'd ask that we'd have the opportunity to apply
23 for reasonable attorney fee for making the settlement
24 materially better.

25 Thank you very much, your Honor. I appreciate it.

1 THE COURT: Thank you.

2 Mr. Berman.

3 MR. BERMAN: Your Honor, Steve Berman on behalf of
4 the class.

5 With respect to -- the first thing I'd like to talk
6 about centers around your Honor's questions; and, that is,
7 counsel in the New York case could get an injunction requiring
8 a rule change. It's interesting to note that he gave you a
9 copy of his complaint. He doesn't seek an injunction; so,
10 apparently, isn't that important to his client to make this
11 rule change. They have litigation. They could seek the
12 injunction.

13 You know, when you're class counsel and you're
14 seeking injunctive relief, there's a debate about whether you
15 even need to bother with a class. Because if you get your
16 injunction that's binding on the defendant, why do you need a
17 class?

18 If they got an injunction against the NCAA -- federal
19 court says you will make a rule change, and the federal court
20 has jurisdiction over the NCAA -- it's done. You don't need a
21 class. In fact, it's probably more effective. You don't have
22 to go through all the arguments against class certification
23 that you saw with respect to this case. So --

24 THE COURT: Mr. Berman, can you address the issue of
25 adequacy.

1 MR. BERMAN: Yes.

2 First, your Honor, you ruled and broke the case into
3 contact and non-contact sports. It's interesting to note that
4 the NCAA labels women's lacrosse as a non-contact sport. And
5 that's one of the reasons why helmets have not been required.
6 Because, actually -- and we were aware of this literature; we
7 saw it in Dr. Cantu's book, that counsel submitted as an
8 exhibit -- helmets are really thought as protection against
9 skull fractures and face fractures, not against concussions.

10 Counsel said that we were unaware of what was going
11 on in the helmet issue. That's not the case.

12 During the pendency of this case, there was a
13 helmet -- football helmet cases that were brought, that were
14 severed from this case by the MDL panel. So, we read the
15 literature about football helmets. We read the literature in
16 Dr. Cantu's book about lacrosse helmets. And this case was
17 never about preventing the first injury.

18 So, what counsel is talking about is having a helmet,
19 whether it's a football helmet or a lacrosse helmet, that may
20 prevent the very first concussion. This case was always
21 focused on the issue of what do you do when people have had
22 lingering post-concussion syndromes? That's medical
23 monitoring.

24 And, two, what do you do when someone has been
25 returned to play improperly? We need to prevent that. You've

1 already got the concussion and you're getting in too early.

2 So, the clients we had were adequate to analyze those
3 issues. And we had, as you recall, your Honor, 8 current
4 class reps, 17 former class reps, 11 non-contact and 14
5 contact athletes. And I believe that they were adequate to
6 look at those issues.

7 And, in fact, your Honor is aware that I think the
8 case law says settlements have to be fair and not perfect.
9 We're never going to get perfection over 4 million people.
10 But with respect to the lacrosse players' lawsuit, we actually
11 achieved almost everything that she wanted.

12 So, I pulled up her complaint here. And one of the
13 things that she asked for was that -- or she alleged is that
14 -- the NCAA failed to implement systemwide guidelines for
15 screening. We've taken care of that in our settlement.

16 Failed to implement legislation addressing treatment
17 and eligibility of student athletes. That's also something
18 that we've taken care of in our return-to-play protocols and
19 educational guidelines.

20 Failed to implement systemwide return-to-play
21 guidelines who have sustained concussions. We've taken care
22 of that.

23 Failed to warn. Done in our settlement.

24 And I could go on to each one of these allegations
25 she's made. And our return-to-practice protocols, educational

1 piece accomplishes everything that she sought in her own
2 litigation. That makes what we did and our class
3 representatives, they looked out for her interest and did an
4 adequate job. So, I would submit to the Court that we have
5 satisfied the typicality and adequacy prong.

6 This case was never about the initial injuries. And
7 look at it this way: Under Mr. Raskas' theory, you shouldn't
8 approve the settlement because there's a lingering issue of
9 whether heading in soccer causes injuries. And maybe some
10 day -- actually, I sued U.S. Soccer over this and there's been
11 some changes. But some day maybe some soccer player will come
12 and say we shouldn't be heading and we should have different
13 rules. That person is free to bring a lawsuit to force a rule
14 change, just like Mr. Raskas is free to bring a lawsuit to
15 force a rule change. He can do that.

16 So, we've achieved a lot for his client. And giving
17 up the right to bring the class case where he can accomplish
18 the exact same thing in a non-class case does not make the
19 settlement unfair, we submit to the Court.

20 Again, I'm under my 30 minutes, but unless you have
21 other questions, your Honor, that's all I have.

22 THE COURT: All right. Thank you.

23 We'll now hear from the NCAA.

24 MR. MESTER: Thank you, your Honor.

25 Good morning.

1 First of all, your Honor, I'd like to personally
2 thank you for your patience through this process. There's
3 obviously been many fits and stops along the way, but you've
4 consistently been patient. It's very much appreciated. The
5 net result of that patience and the efforts is a settlement
6 that I'm very confident is going to benefit a large number of
7 people. While it's probably no surprise that I oftentimes
8 don't agree with Mr. Berman, I do agree that providing a
9 medical monitoring program on the scale and proportion of this
10 one is no small feat.

11 In terms of the settlement itself, I won't go over
12 the statistics that Mr. Berman highlighted, but I think it is
13 worth noting again that for a settlement that received more
14 notice than any case I've ever been involved in in 30 years of
15 practice, there's been an astonishing small number of
16 objections and exclusions. So, it's been exceedingly well-
17 received by the class, I think, by any reasonable standard.

18 I did, however, want to, your Honor, address briefly
19 the Griebner objection. I'll be very brief.

20 I think you asked the question a couple of different
21 times. I'm not sure you ever got quite as clear an answer as
22 maybe you should have. But I'd like to bring your Honor back
23 to what was said in the paper filed by -- on behalf of
24 Ms. Griebner.

25 At Page 29, the objection states as follows: The

1 amended settlement agreement is not fair, reasonable or
2 adequate because it would require women's lacrosse players to
3 release their claims for injunctive relief ordering the NCAA
4 to amend women's lacrosse rules to require women's lacrosse
5 players to wear protective helmets.

6 That's a verbatim quote from the objection.

7 And with due respect to Mr. Raskas, that's simply not
8 correct. As I understand the settlement, as we negotiated the
9 settlement, the release that's being provided here would not
10 prevent anyone -- Ms. Griebner or anyone else -- from seeking
11 injunctive relief in any other lawsuit. And, so, the
12 fundamental premise, I believe, of the objection is flawed,
13 because it's not the case that the release extends to the
14 extent that Mr. Raskas suggests it does.

15 That also, I think, informs the adequacy question.
16 There were many claims made in this lawsuit at the outset and
17 gradually those claims narrowed, as is often the case in class
18 litigation, and we got to where we are today. The claim that
19 we're settling is the medical monitoring claim. I've not
20 heard anything, from Mr. Raskas or from anyone else,
21 suggesting that women's lacrosse players are differently
22 situated or have unique or special circumstances that would
23 require them to get more or less or different medical
24 monitoring than what the entire class is getting. And that's
25 what the settlement does.

1 And that's the claim that the class is giving up.
2 The claim they're giving up is an injunctive claim for medical
3 monitoring. That's the one claim they can't bring. But any
4 other injunctive claim, they can bring; and, there's no
5 indication in the settlement and no intention on the part of
6 the parties to the settlement to eliminate that claim.

7 So, in that sense, I think this is somewhat a red
8 herring. We're not preventing Ms. Griebner or anyone else from
9 doing what it is that she says we are preventing her from
10 doing.

11 But, your Honor, I'd be happy to answer any questions
12 you have.

13 THE COURT: I don't have any questions. Thank you.

14 MR. MESTER: Thank you, your Honor.

15 THE COURT: All right. Let's now proceed to the
16 second portion of this hearing, which is the settlement class
17 counsel's petition for fees, expenses and incentive awards for
18 settlement class representatives.

19 MR. BERMAN: Steve Berman, again, your Honor.

20 This is my least favorite part of any case; and, that
21 is, arguing about attorneys' fees. Again, I'll be brief and
22 answer any questions the Court has.

23 But to be clear, we're seeking \$15 million in fees
24 for the settlement class counsel, based on a lodestar at the
25 time that we filed our petition of 9,791,844. That's based on

1 18,481 hours. That's for 12 firms that worked under the
2 direction of lead counsel: Mr. Siprut and myself.

3 And we have costs of 727,189. And we're seeking
4 service awards of \$5,000 for the original plaintiffs and 2500
5 for the additional plaintiffs.

6 THE COURT: So, the 9.8 million lodestar comparative
7 number, that's based upon the hours of attorneys and staff at
8 your firm, as well as Mr. Siprut's firm, but does that include
9 other firms, as well?

10 MR. BERMAN: It includes the Executive Committee and
11 all the firms that we tasked to do work. So, all in. And I
12 think there's a table in our brief that lists all the firms
13 and summarizes their time for your Honor's ease of
14 understanding where it's coming from.

15 So, in the Seventh Circuit, there are four factors:
16 The risk of non-payment, quality of performance, the work
17 necessary. And I'll just jump into the very first factor.

18 Mr. Siprut filed the very first case. Shortly
19 thereafter, we filed. And we decided to work together.

20 And in terms of risk, there was a lot of press
21 coverage about the initial filing of the case. No one joined
22 us. So, when you're a plaintiff's lawyer and you bring a case
23 and there's a lot of press coverage and no one joins you, you
24 kind of go, uh-oh, what did I do wrong here? No one joined
25 us.

1 So, we worked alone for two years, undeterred by the
2 fact that no one thought we were doing the right thing,
3 apparently. We moved for class certification. We submitted a
4 proffer of facts. We did all the discovery that was
5 necessary.

6 And the risks we faced were substantial. We've
7 already been over that medical monitoring is a risky cause of
8 action. The 23(c)(4) certification that we were seeking, I
9 didn't think it was that risky, but your Honor apparently
10 thinks it is riskier than I thought. But, clearly, 23(c)(4)
11 certification of issues, is not a widely litigated tool and
12 there's not a lot of case law. So, we had risk there.

13 And even the issue at that time of whether the NCAA
14 had this duty was an untested legal claim. There were no
15 decisions.

16 It's only after the settlement -- the fact we were
17 discussing settlement -- came out did others seek to join the
18 litigation. I think that shows you the kind of risk we had.

19 The second factor is the quality of performance. I'm
20 not going to talk about that. You witnessed our performance.
21 You can decide whether we performed well or not. But it's a
22 factor for the Court to consider. And I think we turned in a
23 quality performance.

24 How much work was necessary. The Court is already
25 familiar with that and made a finding that this was a complex

1 case. And, obviously, you've seen there's been extensive
2 record. So, there was a lot of work that was necessary.

3 And the stakes of the case, the fourth factor, it was
4 obviously a high-stakes case from everyone's perspective.
5 From NCAA, it was high stakes at many levels. From our
6 perspective, it was high stakes on protecting the rights of
7 the plaintiffs on a very important issue.

8 So, those factors, I think, all favor our fee
9 application.

10 Now, our fee application is asking for a multiple on
11 that lodestar of 1.5. I did a little math, and if you took
12 the time that we put into this matter since we filed that fee
13 application, I think our actual ask is going to be about 1.2.
14 And if the Court wants me to file updated time records to
15 prove that point, I'd be glad to do so.

16 But the point I'm making is when we ask for 15
17 million out of the 70, we can only get 70. That's the most we
18 can get when we negotiated after a lot of negotiating. And we
19 wanted to get as much as we could to the class. And, so, we
20 took -- I anticipated what our lodestar might be, and I wanted
21 to come out at about a 1.5, which I think is a very kind of
22 small multiple, given the risk that we undertook in this case.

23 We've given you cases that suggest multiples up to 4
24 or 5 are permissible. But, again, we didn't want to make this
25 a lodestar type of case -- I mean, a big high multiple type of

1 case.

2 So, we think that that request is a reasonable
3 request for the risk and the outcome that we've obtained for
4 this class.

5 Unless you have a lot of questions, that's all I have
6 to say, your Honor.

7 THE COURT: No.

8 I would like to hear from someone from the Siprut
9 firm.

10 MR. SIPRUT: Thank you, your Honor.

11 THE COURT: Can you state your name for the record,
12 please.

13 MR. SIPRUT: Joe Siprut, settlement class counsel on
14 behalf of the settlement class.

15 I won't repeat everything my colleague, Mr. Berman,
16 set forth for the Court; but, certainly, on all those same
17 bases, we would urge that the Court approve the fees and view
18 it not only as worthy of approval, but safely within the
19 benchmarks of the Seventh Circuit.

20 The standard percentage of the fund in the current
21 Seventh Circuit case law ranges anywhere from 35 to 50
22 percent, which isn't to say it couldn't ever be lower. But
23 the most recent cases -- which I think we cite in our
24 papers -- talk about how the presumptive range is between 35
25 and 50 percent.

1 So, our number here, even after not including -- or
2 excluding -- the \$5 million in research and excluding the \$5
3 million that we've characterized notice costs as being --
4 probably be less than that, but conservatively, assuming it's
5 5 million -- that leaves you with 65 million. The request
6 against that number is a very modest 24 percent.

7 So, we could have asked for more, but we didn't. And
8 I think that to the extent the aspiration originally, as
9 Mr. Berman said, was to end up with something like a 1.5
10 multiplier, we've done that. And, again, there we have a very
11 conservative allocation. As you often see approval given to
12 lodestars of 2 or 3X, we seek only or need only receive
13 approval for 1.5X.

14 THE COURT: So, Mr. Siprut, there's some mention in
15 the fee petition with regard to a change in the way your firm
16 handled timekeeping during the case -- during the life of this
17 case. Could you explain that in a bit more detail for me,
18 please.

19 MR. SIPRUT: Yes.

20 At all relevant times, including now, including the
21 day we filed, we had in place firm-wide systems that were
22 fully compliant with the relevant standards in the law. From
23 almost all of the life of the case up until probably the last
24 two years ago, but up until the time that we settled the case
25 certainly, there was in place a system that differs from the

1 present one.

2 The prior one basically required that all time of the
3 attorneys working on the case be allocated to one of seven or
4 eight enumerated task billing categories. Those were
5 generally standard for every case but could be customized,
6 depending on the nature of the case. But for class actions,
7 it was generally pre-filing investigation; client, you know,
8 searches; screening, and so forth, for class reps; pleadings
9 drafting, and so forth; motion practice; fact discovery; oral
10 discovery.

11 So, the point was every individual attorney was
12 tasked with keeping track of their time to match the
13 categories that the firm itself reported and tracked.

14 And, so, because of the fact that we didn't have a
15 monthly invoicing system where clients would get bills every
16 month, the requirement was that when the firm was in a
17 position to have to submit that time -- whether it be because
18 we were filing something that required it or because, for
19 example, we were exchanging time with co-counsel or whatever
20 internal issue there may have been -- we would then say, okay,
21 everyone make sure that your time is in our database, so that
22 we can report the most recent updated figures.

23 So, that's what we did for several years. And at the
24 time that we did, it was compliant with all relevant legal
25 standards.

1 Recently, however, as the Court, I'm sure, is aware,
2 there has been increasing interest in looking at sort of
3 narrative, detailed descriptions submitted by class counsel.
4 And there have been one or two instances -- or there were one
5 or two instances -- I was personally involved with where we
6 submitted our records as I've described and the reaction of
7 the court was, how come it's not in detailed narrative format?

8 The short answer at that time was, you know, I
9 thought one of the benefits of being a plaintiff's lawyer and
10 leaving the corporate litigation life behind was that I no
11 longer had to describe my life in tenths of an hour with, you
12 know, some sort of justification for what I did. It turns out
13 I was wrong about that. And many courts have said, why don't
14 you have that?

15 Well, once it became clear that this sort of trend
16 was changing and I was reading, as we all have, you know,
17 other cases throughout the country where the same issue came
18 up, we said, all right, we need to get our system basically as
19 comprehensive as any corporate litigation firm has. Even
20 though we're not actually billing anyone, we have to keep
21 track of our time in narrative format just like the old days
22 of corporate litigation.

23 So, we did switch. About two years ago, we switched.
24 We have a system called Time59. And the requirement of all
25 lawyers at the firm right now, including me and including the

1 most junior associate, is the same, which is: Detailed
2 narrative descriptions in tenths of an hour contemporaneously
3 inputted into the system. In other words, exactly what, you
4 know, Latham or Winston, or whoever, does and exactly like I
5 used to do for the first ten years of my career.

6 So, we now have that system in place, and going
7 forward it will remain in place.

8 But that's what we were referring to in our filings
9 in terms of the prior system versus the new system.

10 THE COURT: Okay. Thank you.

11 MR. SIPRUT: Thank you, your Honor.

12 MR. EDELSON: Good afternoon, your Honor, Jay Edelson
13 for the lead objector.

14 I wanted to start, unusually, by arguing against my
15 own interests, only because I think that the facts are the
16 facts and people should get credit when they deserve credit.

17 I was not aware of what Mr. Berman was going to start
18 with with his fee presentation, but I agree that that is the
19 right way to look at it.

20 To me, there are two types of cases that are brought.
21 People call them different things. I call them either
22 proprietors' cases or chase-the-news cases. A chase-the-news
23 case would be the Equifax data breach where it's in the New
24 York Times and everybody filed. And I don't think plaintiff's
25 attorneys deserve the same amount of credit for bringing that

1 type of case.

2 This case was brought not by me, but by Mr. Siprut
3 first and then Mr. Berman, I believe, in 2011. And as class
4 counsel noted, there was not a huge amount of plaintiff's
5 attorneys, myself included, who said, no, we want to compete
6 and take this case. And the reason was because it was a very
7 risky case. I think they still are very risky cases, but
8 especially at that time. They were not deemed to be terribly
9 viable cases. They deserve a lot of credit for that.

10 They also knew they were going up against NCAA.
11 Mr. Mester is, as you know, a very skilled attorney. NCAA has
12 unlimited resources, virtually, you know, for purposes of this
13 litigation. And these cases matter a lot to them.

14 So, I want to start, again, arguing against my own
15 interest, but by noting that they deserve a ton of credit for
16 bringing this case and litigating it for years, which they did
17 do, and putting a lot of their own money in.

18 Okay. With that being said --

19 Can we go to the first and only slide?

20 This is the extent of our PowerPoint presentation,
21 except we'll have two other columns.

22 I think it's really important that the Court looks at
23 what the original deal is in trying to figure out how class
24 counsel should get paid. I notice that Mr. Berman focused
25 mostly on lodestar. But when you're talking about this type

1 of tort settlement and where there is a common fund, the most
2 important thing is what is the class actually getting. And
3 when you read cases like Pella in the Seventh Circuit, that
4 really is the focus, which is not what is the price tag of the
5 settlement. Anyone can say a settlement is worth \$70 million
6 or \$200 million, but what's the actual amount that's being
7 paid out and can benefit the class?

8 So, what was the original deal?

9 And I'm going to be quick because I know your Honor
10 knows this well better than I or any of the other counsel
11 here.

12 The original deal was a claims-made deal. It was a
13 claims-made deal without any real notice going out.
14 Publication notice alone. When you have publication notice in
15 a claims-made deal, you're going to get very few claims.

16 Their own expert said that there were going to be
17 maybe 5,000 medical tests given. He anticipated that there
18 was going to be a \$50 million reverter. \$50 million. And of
19 that, the NCAA at the time was still allowed to take over the
20 subrogation claims and get a bunch of that back.

21 So, of the fund, even after you take away the \$50
22 million, half of that would go to the class counsel and the
23 other half -- most of the bulk of the rights would be assigned
24 back to NCAA, where they can pursue the subrogation claims,
25 which is really scary.

1 And the reason why we got involved in the objection
2 is this settlement actually originally -- and I think it's a
3 good settlement now, but originally -- I think, actually hurt
4 the class. And the reason -- to understand, I think, why they
5 came up with this framework, the big concern for the NCAA was
6 the personal injury cases. And they, kind of cynically and in
7 a very clever way, figured out they could settle this case and
8 cut off a lot of personal injury cases.

9 How did they do that? First of all, they said -- and
10 this is from -- I've never seen this in a another settlement.
11 They said the statute of limitations will start tolling at
12 preliminary approval. So, before any notice goes out or
13 anything else, the statute of limitations for all individual
14 cases starts tolling. That -- if that objection -- if --
15 sorry. If that had been the deal, then all these people who
16 now are coming -- I think the Court approved this case
17 preliminarily two years ago. Their statutes would have been
18 running.

19 We also have the issue of the class personal injury
20 claims. Mr. Berman spent a lot of time arguing that nobody
21 cared about it; but, as your Honor knows, that's not true.
22 There are over 300 personal injury class actions going right
23 now.

24 Based on the original settlement, then, I think the
25 Court should look at what the actual payout is to the class,

1 which is something under \$10 million.

2 Then the next question is, well, how much credit do
3 they get for the new settlement? And with respect to class
4 counsel, they were not our friends in pushing for changes.
5 There are times when class counsel says, we are now in a
6 better position and we can argue for more. And they didn't.

7 Mr. Berman was in the press every day saying -- I
8 shouldn't say every day. That's an overstatement. He was in
9 the press saying, you can't get these classes certified. He
10 was arguing that a reversionary fund was appropriate. He was
11 arguing against notice. Not once did he join us and say, we
12 can make this settlement better.

13 So, I don't think that the Court should give them
14 much credit for the settlement now. I think the Court really
15 should just focus on their first settlement that was rejected.

16 Thank you, your Honor.

17 THE COURT: Thank you.

18 Mr. Berman.

19 MR. BERMAN: Unless you have questions, your Honor, I
20 don't think I need to respond. I will say one thing,
21 actually.

22 One way to look at this is Mr. Edelson focuses on
23 you're trying to value what we did originally, what we did
24 later, what he did to make it better. And that's a cat fight,
25 that I stayed away from in my opening remarks and we're going

1 to stay away from today.

2 But if you look at it on a lodestar basis, you can
3 avoid that cat fight. Because all the time we put in was time
4 that was necessary to get where we are today. And we're
5 asking for a modest multiplier. He doesn't dispute that.

6 And one thing -- another reason to get away from
7 Mr. Edelson's valuation argument is he doesn't value the
8 return-to-play protocol at all. How would you put money on
9 saving a kid from a debilitating injury?

10 So, that's all I have to say, your Honor.

11 THE COURT: Thank you.

12 Now we'll proceed to the last portion of this
13 hearing, which is petition for attorneys' fees, service
14 awards, filed by other counsel.

15 Mr. Edelson, I take it we're going to see the rest of
16 that PowerPoint slide.

17 MR. EDELSON: We are. Thank you, your Honor.

18 So, your Honor is very familiar with our objections.
19 I'll go through them very quickly. Our first brief, Mr.
20 Berman, in his papers, made a strange comment that our whole
21 argument is based on a footnote, that we barely mention the
22 reversionary issue. That's not true. Our first brief where
23 we objected, we talked about how the settlement is a mess and
24 explained that very few people were going to get any relief at
25 all. And we put the actual relief at about \$150,000.

1 Now, your Honor didn't accept that in total. But we
2 were very focused on the fact that there were going to be very
3 few claims, and that was the bulk of our argument. So, we
4 argued that the reversion was inappropriate.

5 Go to the other column.

6 The Court ended up -- your Honor -- only your Honor
7 knows what influenced you. So, I kind of concede that. But
8 in the end, your Honor seemed to agree with that and now there
9 is a non-reversionary fund and the actual money is going out.

10 We made a big issue about notice and said you can't
11 just do publication notice. Your Honor agreed with that, as
12 well. Because of that, as Mr. Mester says, we have incredibly
13 robust notice, which really is the key to any class
14 settlement. If you don't give notice, there's not a lot of
15 value beyond the injunctive relief, which the Court can
16 evaluate.

17 We talked in our objections about the medical tests
18 were going to benefit very few people. We talked about how
19 the testing locations, there are only a few of them. People
20 drive hundreds of miles to get to them. There were
21 significant increases in that.

22 The Court knows that our primary focus of our brief
23 -- of our briefing -- was about the class personal injury
24 claims, and those were preserved. It's true that they were
25 not preserved on a nationwide class basis, but that's really

1 of little moment because people --

2 THE COURT: It didn't seem to create any sort of
3 impediment for people to file class actions on a more limited
4 basis asserting personal class -- personal injury claims.

5 MR. EDELSON: That's correct, your Honor. So -- and,
6 you know, I think that your Honor's ruling made sense, of
7 course.

8 And, then, of course the tolling issue, which I've
9 read before, I think, is a really big one. The fact that
10 personal injury statute of limitations were going to be
11 untolled at preliminary approval was really cynical and was
12 going to hurt a lot of people. And we made those arguments,
13 and those were accepted, as well.

14 We -- I agree with Mr. Berman. I'm not really
15 interested in having a huge cat fight. Your Honor knows our
16 work. You can evaluate if we were helpful or not. You know,
17 we certainly put in a lot of effort and took a lot of risk.

18 The only other point I would make, unless your Honor
19 has questions, is we also asked for incentive awards for
20 Mr. Nichols and Mr. Arrington.

21 If I understand correctly, class counsel thinks
22 Mr. Nichols should get \$2500 instead of 5,000 because he
23 wasn't a very active participant. That's just not true.
24 Mr. Nichols was a very active participant and fought very hard
25 for this and fought publicly. His name was out there. And

1 it's hard doing that against the NCAA. We deal with clients
2 all the time that are scared to go up against them.

3 Mr. Arrington, my understanding is that nobody's
4 objecting to his incentive award. I think that they're not
5 taking a position on that.

6 MS. FAGAN: Correct.

7 MR. EDELSON: Okay. Thank you.

8 And we think he also deserves the same \$5,000
9 incentive award.

10 I'm happy to answer questions or go back to my table.

11 THE COURT: No. Thank you, Mr. Edelson.

12 MR. EDELSON: Thank you.

13 THE COURT: Mr. Gordon.

14 MR. GORDON: Good morning, Judge, Richard Gordon.

15 Mr. Berman's firm says that I'm claiming to have won
16 the lottery and seeking a participation trophy. And that
17 couldn't be farther from the truth. I have a unique practice.
18 I represent professional athletes in Illinois in workers'
19 compensation. And in 2013, dozens of my clients began calling
20 me about this case and about the NFL concussion case and
21 asking what their rights were, because I was their lawyer or
22 my father, who was -- I was partners with, was their lawyer.
23 That's how I got involved in this case.

24 I know Mr. Nichols. I communicated with him about
25 this case. And I brought in the Edelson firm because I knew I

1 needed to have that kind of muscle behind me to participate in
2 what, at the time, I saw as a bad settlement for these
3 players.

4 And, so, during the entirety of this lawsuit, I have
5 essentially been the liaison between Mr. Nichols and other
6 class members we had. You know, Mr. Nichols was the sole
7 class representative, but we had retained dozens of players as
8 class representatives whose interests were being furthered
9 through Mr. Nichols; and, I was also keeping about a hundred
10 other players abreast of what was going on here.

11 The time that I put in was real time. Most of that
12 time was my own time put into this case. I was responsible
13 for understanding these players' claims and for helping to
14 communicate what these players were looking for. I think that
15 the amount of time put in was commensurate with the efforts
16 involved. And the effort and risk was certainly there, as
17 well.

18 For that reason, I would say that my time should be
19 compensated as put forth in the pleadings.

20 THE COURT: Thank you, Mr. Gordon.

21 MR. GORDON: Thank you.

22 THE COURT: Ms. McNulty.

23 (No response.)

24 THE COURT: Mr. Jefferson.

25 MR. JEFFERSON: Thank you, your Honor.

1 Dwight Jefferson representing objector Julius
2 Whittier.

3 Judge, first of all, let me express my thanks to the
4 Court and the Court's staff. Over the past couple years in my
5 involvement in this case, your staff has been very courteous
6 and cooperative.

7 Judge, I know that, from observation of you in the
8 past couple years, that you have read thoroughly every motion
9 and exhibit that has been submitted to the Court and are very
10 familiar with both the facts and the law regarding these
11 requests.

12 Contrary to what Mr. Berman said from the standpoint
13 of the publicity associated with the original filing of this
14 case, my knowledge of the case really did not accrue until
15 sometime shortly before I became involved in the case on
16 behalf of Mr. Whittier.

17 My purpose in undertaking the case and appearing for
18 the first time in the case, I believe, at the first
19 preliminary settlement hearing was that after becoming aware
20 of Mr. Whittier's condition and talking with him and taking on
21 this case, my purpose, quite frankly, was to come and to
22 object on his behalf to the settlement as it was originally
23 presented, as has been pointed out today, with the non-tolling
24 of the statute of limitations, along with the prohibition
25 against any type of personal injury class.

1 Mr. Whittier over the course of this case, as the
2 Court is aware, has finally succumbed to the Alzheimer's,
3 which ended his life. He had been an attorney; the first
4 African American to letter in football at the University of
5 Texas; to go on from there to the University of Texas Law
6 School, to a distinguished career in the practice of law in
7 Dallas County, both as a prosecutor and in private practice.

8 And, so, my involvement was personal to that extent,
9 which is one of the reasons I have asked for an award for
10 Mr. Whittier, along with a request for the fees associated
11 with my representation of his interests in this case.

12 He, as an Alzheimer's victim, suffered from one of
13 the most severe diseases associated with the issue involved in
14 this case of repetitive head injury; was the only putative --
15 was the only class member -- named class member -- I think, in
16 the case that was really suffering from that type of
17 condition. And, so, he represented all those persons still
18 suffering from that same disease.

19 I tried to be conservative in my fees in the sense
20 that the hourly fee charged on this case was really below my
21 standard fee. In addition, I tried to be conscious of the
22 time involvement in the case related to my involvement. I
23 tried to be, as I came into this case, an active participant
24 in trying to make the settlement better and preserving those
25 potential rights for those persons who are actually suffering

1 from diseases today.

2 It is within the sound discretion of the Court with
3 regard to these awards and to the attorneys' fees. And, so,
4 with that, on Mr. Whittier's behalf and my firm's behalf, we
5 will submit our written documentation to you and request the
6 fee that has been requested at your sound discretion.

7 THE COURT: Thank you, Mr. Jefferson.

8 MR. JEFFERSON: Thank you, your Honor.

9 THE COURT: So, Mr. Berman -- Ms. Fagan.

10 MS. FAGAN: Good afternoon, your Honor, Elizabeth
11 Fagan for the plaintiffs.

12 Your Honor, we acknowledge that objectors can play an
13 important role in reviewing class action settlements and being
14 an adversary. And we recognize that this Court found that
15 important during the preliminary approval process. But not
16 all objections are created equally. The Seventh Circuit has
17 set a standard for when to award fees to objectors. The
18 Seventh Circuit has said that objectors must produce an
19 improvement in the settlement worth more than the fee they are
20 seeking, otherwise they have rendered no benefit to the class.

21 And, so, as this Court looks at each fee petition, it
22 is important for the Court to look at the particular tangible
23 benefit that the objector brought to the class.

24 If we start with the first premise of why Mr. Edelson
25 was appointed, this Court appointed Mr. Edelson to evaluate

1 the strength of the procedural claims and, quote, whether the
2 personal injury claims of the proposed class against the NCAA
3 are capable of being certified under Rule 23(b)(3) and
4 23(c)(4).

5 Ultimately, the scope of the release as part of that
6 adversarial process was amended. But the Court, during that
7 process, found that the release of a nationwide class under
8 (b)(3) was of minimal value. And, in fact, the primary
9 benefit conferred upon the class is the value of the
10 single-sport/single-school MDL, in which Mr. Edelson is
11 currently a participant. That is where the risk of those
12 classes will ultimately be paid. This class here should not
13 bear the fees that will otherwise be gotten in the separate
14 MDL.

15 In fact, Mr. Edelson seeks an unheralded 4 multiplier
16 on his time. That's compared to class counsel, who is seeking
17 at most a 1.4 multiplier. And if you take our current time
18 into place, it's 1.2.

19 But here, in the Seventh Circuit, multipliers are
20 awarded based on risk. And if we look at the risk that
21 Mr. Edelson faced at the time that he filed his objection, he
22 took the discovery we did. He did no additional discovery.
23 He relied on the experts that we had. He hired no additional
24 experts and didn't submit any experts to this Court. He bore
25 very little risk, particularly once this Court defined him as

1 the lead objector and defined his task. It was attorney time
2 purely.

3 Recently there was a case in the Southern District of
4 New York, In Re: Petrobras in 2018. There the objector sought
5 a lodestar with a multiplier of 1.7. And the court said: A
6 substantial reduction is appropriate, as the vast majority of
7 objectors' briefing concerned unsuccessful arguments.

8 And the court also rejected the multiplier saying the
9 objector faced no risks in his involvement.

10 And, so, if we look here at the issues on which
11 Mr. Edelson was successful, first he did bring up excluding
12 class counsel from the release at the very outset. And we
13 immediately conceded that. That was not briefed, and there
14 was no substantial time put into that issue.

15 Similarly, he brought up the issue of cy pres and
16 whether the schools should have to do additional, separate
17 testing or research other than what was already under way.
18 Again, that was resolved up front.

19 He also raised the issue of tolling. We immediately,
20 again, conceded on that issue. That was not an issue that was
21 fought over the last three years.

22 And, finally, he claims responsibility for notice.
23 However, the original notice plan before this Court always
24 contemplated direct notice. What we didn't know at the outset
25 was how many schools would produce their address lists. So,

1 we weren't sure of the extent of the notice plan. So, what we
2 did was we presented several scenarios to the Court that
3 envisioned more or less publication notice, depending on the
4 responses from the schools.

5 And, obviously, luckily here, after a hard-fought
6 process, we were finally able to get all those addresses from
7 the schools and get direct notice out to every single class
8 member for whom there was contact information.

9 So, ultimately, here if we look at -- going through,
10 there were lots of other issues that Mr. Edelson raised that
11 were not successful and were not successful after extensive
12 briefing before this Court. And, so, while the adversarial
13 process here did result in the separate MDL, it did not result
14 in a change in the monetary amount of the settlement -- the 70
15 million that the class has always been able to get -- or the
16 fact that there's a 50-year medical monitoring program in
17 place.

18 Your Honor, if we move to Mr. Gordon's petition, I
19 think we just have to start with the threshold question of
20 whether he conferred a benefit on the class. Everything that
21 he stood here and described was him advising his individual
22 clients as to their rights. None of his work was presented to
23 this Court. Looking at his detailed time, a lot of his time
24 is reviewing pleadings after they were filed, marketing to
25 clients, marketing to referral lawyers, and attending

1 hearings. But he never -- this is the first day that I'm
2 aware of that he stood before the Court.

3 Ultimately, your Honor, fees are not awarded to
4 objectors just for appearing, nor are they awarded to probably
5 the several hundred lawyers that may have opined to their
6 individual counsel -- or counseled their individual clients on
7 the scope of this settlement.

8 Your Honor, Ms. McNulty was not here. We don't
9 object to Clifford's lodestar. We just object to the extent
10 that they join in Mr. Edelson's request for a 4 multiplier.

11 Finally, your Honor, with respect to Mr. Jefferson,
12 Mr. Jefferson has been here from the outset. We appreciate
13 that. We understand his part of the adversarial process. I
14 think the main part of our objection as to his time would be
15 the time spent after Mr. Edelson was appointed lead objector,
16 to the extent he was just joining in Mr. Edelson's positions.

17 If your Honor has any questions?

18 THE COURT: No. Thank you very much.

19 MS. FAGAN: Thank you.

20 THE COURT: All right. So, Mr. Edelson.

21 And, then, afterwards, I'll provide Mr. Gordon and
22 Mr. Jefferson with a brief time for response, if they would
23 like.

24 MR. EDELSON: Thank you.

25 Your Honor, it's interesting to hear that I took very

1 little risk in this case. That's not been my experience over
2 the last few years. They actually spent a lot of time talking
3 about how hard it is for objectors to get paid, which is true.
4 And we're not a firm that actually objects to cases in order
5 to get money. We did this because we thought it was a bad
6 deal. And we took an enormous amount of risk.

7 They make a few other arguments which just seem very
8 inconsistent. They say that once we were appointed lead
9 objector, we had very little risk at that point and should
10 consider the time differently. Well, if that's true, then you
11 should consider their time differently, as well. They spent,
12 apparently, millions of dollars renegotiating the deal. At
13 that point, it was pretty clear that a deal was going to
14 happen and they were going to get paid. Why should they get
15 any multiplier on that at all?

16 The reason is that courts generally look at the total
17 time and don't parse it out and say for this part of the case,
18 there was actual risk; for this part of the case, there was
19 this much risk. We think that you should do that.

20 Similarly, in regard to our lodestar, their
21 comparison to their \$9 million lodestar -- which you can
22 evaluate for yourself -- that is an enormous number to put up
23 in any sort of case, especially one like this which didn't get
24 anywhere close to trial. I don't believe that it is easy for
25 them to stand here and say that their -- that a 1.5 multiplier

1 is really what they're getting. Even their reasoning makes no
2 sense. Somehow Mr. Berman always knew that there was going to
3 be a 1.5 multiplier, so that's what he negotiated back years
4 ago knowing then he was going to have to spend millions of
5 dollars more negotiating the deal.

6 I think the reason courts don't look so much at
7 lodestar is because they tend to be a little bit of a fiction.
8 As Mr. Siprut strangely said, he doesn't even think class
9 counsel -- he thought the trend wasn't that class counsel
10 should have to account for its time like corporate attorneys.
11 That's, of course, not true. I've been practicing with my own
12 firm for 17 years, and you have more of a duty to keep track
13 of your time.

14 But, of course, since you don't have a client who is
15 looking every month and looking at the bill and scrutinizing
16 it, there is -- there are incentives to put the thumb on the
17 scale a little bit. That's why I think that you should look
18 at what the actual benefit is to the class. Ms. Fagan ignored
19 the fact that it was over attorney settlement before.

20 The idea that notice was actually going out wasn't
21 true. I think your Honor made this point, not me -- but I
22 swear I was about to make it right before you did -- where it
23 was an easy fix. All they had to do was say if the member
24 institutions wanted to get the benefit of the release, they
25 had to send notice out. And, then, of course, that forces the

1 member institutions to send notice out. That's why notice
2 went out. Otherwise, if you just left it to their discretion,
3 it would have been purely publication notice.

4 I don't know why Arrington's counsel wasn't here
5 today. I just want to speak on her behalf that the Clifford
6 firm did great work and also they're like us. They're not a
7 firm that objects. And there is reputational harm in stepping
8 up and objecting to class settlements. At the end of the day,
9 class action attorneys like to work and play well together.
10 And if you object to settlements, we get invited to fewer
11 parties, which hurts our feelings.

12 That's all I have. Thank you, your Honor.

13 THE COURT: Thank you.

14 Mr. Gordon.

15 MR. GORDON: Thank you, your Honor.

16 Just very briefly, the suggestion that my efforts
17 here were marketing is, frankly, not true and not accurate and
18 really just kind of shows kind of the different way that some
19 attorneys look at this type of a case.

20 Counsel -- Mr. Berman represented one player. We
21 objected with one player's name, but we used the data and the
22 comments and the criticisms of dozens of players to come up
23 with what made a better deal for everybody, I think. And
24 that's essentially -- that was the role that I played in this,
25 as well. Communicating with and conferring with class members

1 and their attorneys is not marketing. It's what made this
2 settlement better.

3 Just real quickly in terms of risk, like I said
4 earlier, I represent professional athletes. There was great
5 risk in me getting involved in this case. And, so, the
6 suggestion to the contrary, I think, is not supported by the
7 reality of things.

8 THE COURT: Thank you.

9 Mr. Jefferson.

10 MR. JEFFERSON: Judge, just briefly, three things
11 that I believe brought value to the settlement for the class,
12 that I participated in and was involved in from the first
13 preliminary hearing.

14 First of all, the reverter. In my opinion, and as I
15 argued to the Court, that -- and as the Court saw, as well --
16 that was really kind of unconscionable to think that you would
17 have a settlement where the money would revert back to the
18 settling party. That was -- that had a value of \$50 million
19 that's going to inure to the benefit of the class.

20 The limitations on -- the tolling of the statute of
21 limitations, that can impact the class, as well, because from
22 the time that the monitoring starts, we don't know what it's
23 going to show. There may be very well people within the class
24 who would then qualify to be part of the subsequent class of
25 single-sport/single-school. That's a benefit to the class.

1 And, finally, a benefit to the class -- or the
2 putative class -- members was the action that the Court has
3 taken on the argument of the objectors to take a look at a --
4 single-sport/single-school class actions for the personal
5 injury.

6 And I know that counsel pointed out in his remarks, I
7 guess, in quotations from you, that the chances were minimal,
8 or whatever. And all I could think of when I heard that, to
9 be quite honest with you, Judge, was dumb and dumber and the
10 thought that we actually have a chance from the standpoint of
11 those putative plaintiffs.

12 Thank you, your Honor.

13 THE COURT: Thank you, Mr. Jefferson.

14 Mr. Mester, does the NCAA take any position with
15 regard to the fee petitions at all?

16 MR. MESTER: No, your Honor. We have an agreement
17 that we would not do so.

18 THE COURT: Okay. Very good.

19 Thank you, ladies and gentlemen. This concludes the
20 fairness hearing. I will take the motion under advisement,
21 and I will be issuing a written order shortly.

22 Thank you.

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1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter.

3
4 /s/ Joseph Rickhoff
Official Court Reporter

March 4, 2019

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